

**WEF TMDL COMMENTS
DEVELOPMENT AND IMPLEMENTATION
PROCESS ISSUES**

Sub work group members at WEFTEC:

Al R.
Chuck
Dave DuBois
Libby Ford

WEF KEY TOPICS AND CONCEPTS:

I. Approval Process

A. Draft WEF Concepts

1. **Timing** – Can we call for Approval or Disapproval Within X days. If not, then automatically the TMDL receives “Interim Final” approval status. We’ll need to research the Alaska decision to see if we can craft something that would not be inconsistent with that ruling. Also, can we find out under what authority EPA now publishes rules as interim final before all review is done?
2. **Basis for Disapproval**-- Should be limited to when the TMDL does not contain each of the required minimum elements. Before EPA can disapprove a TMDL it must consult with the State and give the state a reasonable opportunity to discuss the issues and resolve them. If the TMDL is found not to be based on “good science” this can also serve as the basis of disapproval.
3. **Implementation Plan** – If the TMDL contains an implementation Plan that addresses all the required elements, and which was derived through the mandated public comment process, EPA can not disapprove the TMDL because it does not believe the WQS will be achieved through implementation of the Plan. Our justification should be built upon the fact that the TMDL requirements must be interpreted within the broader context of the CWA. In the CWA congress clearly continued the tradition that States can and must take the lead on water quality issues. Further, because the means through which much of the TMDL implementation must be achieved (land use controls, NPS issues etc.) EPA can not substitute it’s judgement for the States in terms of what will be achieved through the various elements of then

implementation plan. The only exception to this is if one or more key elements of the IP is based upon incorrect or "bad" science.

B. EPA Proposal

Implementation Plan Format

Set within the guidelines for TMDL establishment is a requirement for an implementation plan. Along with this requirement, EPA has established very detailed guidelines for the format and overall content of the implementation plan.

C. EPA Questions

Should States, Territories and authorized Tribes be required to submit implementation plans and should the implementation plans either be required as an element of a TMDL, as a required submission accompanying the TMDL, or as an update to a water quality management plan submitted at the same time as the TMDL? Pg. 46036, columns 1 paragraph 2.

D. Possible WEF Comment

1. A major concern is the proposal to include implementation plans as part of the minimum elements required for TMDL development. From the standpoint of authority, EPA claims to have the authority to require an implementation plan as an element of a TMDL under section 303(d). However, EPA also states that "section 303(d) and its sparse legislative history are silent or ambiguous on the specific question of whether or not an implementation plan should be part of a TMDL." Given this statement, the agency would seem to have just as much reason not to require an implementation plan. Further, EPA states that "section 303(d) does not provide any additional CWA authorities to implement nonpoint source controls." If this were the case, by requiring implementation plans as a component of TMDLS, it would be claiming de facto authority on implementation plans by linking them to TMDL approval. [ST]

2. EPA reasons that implementation plans should be required "so States will plan for implementing TMDLs." Further, EPA states that "it believes States will develop more successful implementation plans if the failure to submit a plan or an adequate plan means that the TMDL will be disapproved." EPA should not use its own mistrust of states as justification to assume authority it does not have and dictate to states. EPA is usurping state authority and claiming it as its own. We also have other practical concerns

regarding implementation plans being required. There should be a timely process for development of implementation plans. The information gained by the development of TMDLs should be used for the development of implementation plans. If both have to be submitted simultaneously, the implementation plan will have to be developed without the benefit of information gained through the TMDL development. [ST]

3. State developed TMDL Reports are submitted to EPA for review and approval. States should be allowed to negotiate and work out areas of disagreement with EPA instead of giving EPA the ability to make TMDL component changes unilaterally. [AH]

II. Multi- Jurisdictional TMDLs

A. WEF Actions

We will develop a series of short (no more than one page) descriptions of some of the on-going plans/TMDLs etc. these write ups will highlight some of the unique issues.

Long Island Sound Libby Differing N WQS NY and Ct; EPA is also developing one.

Different factual/ data development efforts
(attenuation factors)

Waterbody wide reduction figure set, based upon a basin wide ratio of point and non-point. This ratio does not hold true within the sub-areas.

South San Francisco Bay Chuck

Chesapeake Bay

Illinois AI

B. WEF Concerns

1. How must the "reasonable assurance of the ability to meet WQS evaluation be done when out of watershed sources contribute significant parts of the current load of the pollutant?

2. If there are in place State or federal air quality improvement programs which will lower over time the amount of the pollutant which is available for air deposition, the TMDL can assume 100% compliance will be achieved within the established timeframe.

C. EPA Questions

1. Should TMDLs for international waters allocate reductions to sources both within and outside of the United States or allocate reductions only within the United States? Pg. 46037, columns 2 paragraph 4.

III. Public Participation

A. WEF Concept

1. Support the proposal.
2. Any changes we want to proposal?

B. EPA Questions

1. What should be the requirements for **public participation and coordination** with Federal agencies? Pg. 46038, columns 1 paragraph 2 and columns 3 paragraph 5.

C. EPA Proposal

1. Under the proposed 40 CFR 130, public participation will occur in almost every step of the TMDL process. Aside from the requirements already described for the listing methodology, **public participation is also required for the list of impaired and threatened waters, priority rankings, TMDL establishment schedule, and the final TMDL.** In all of these cases the DMA must provide the public with no less than 30 days to inspect and comment on the various sections. At the same time that the reports are up for public inspection, the DMA must also submit the draft to the EPA, U.S. Fish and Wildlife Service and to the National Marine Fisheries Service (where appropriate). When submitting the final reports, the DMA must include a summary of all the public and EPA comments and documentation on how these comments were incorporated or why they were not incorporated into the report. EPA will review the list of comments and how the DMA

addressed these comments prior to approval or disapproval of the submission.

D. Possible WEF Comments

1. TMDLs approved by EPA should be posted on the Internet. Third parties should be allowed easily access to the components of the TMDL and be allowed to sue responsible parties who fail to perform the approved implementation plan. Public involvement is important in the TMDL process. [AH]

IV. Regulation versus Guidance

A. WEF Concepts

1. A **Regulatory Framework** should be established which clearly sets out minimum expectations and requirements. This should include key definitions, required elements [what else?] Because the derivation of TMDLs and their ability to be an integral part of the state's plan to resolve the water quality program, the details of what must in a workable TMDL are too site-dependent for there to be a lot of detail in the regulations.

2. **Programmatic Guidance** should be issued which sets fourth issues for consideration when developing a TMDL, examples of factors which may vary from area to area, suggested formats, a "tool box" of possible elements for each required element etc.

B. WEF Action

1. We will attach a either a marked up version of the proposed regulation, a table or a listing of elements of the proposed regulation that we think should be moved into guidance.

C. EPA Questions

1. State Flexibility vs. National Uniformity

V. Schedule

A. WEF Concepts

1. The TMDL and it's IP does not have to predict the date by which the WQS will be achieved. The very nature of some of the

WQ problems (added heat, problems caused by air deposition etc.) dictates that it may take 15-30 years and perhaps even longer for ambient WQ to achieve compliance.

B. WEF Actions

1. Nixon Peabody will research whether the court imposed processes/deadlines can be modified to allow those states to follow the new, revised process and timelines. [Libby anticipates that the answer will be that a petition would have to be submitted to the Court asking for a modification of the Court Order. This would mean that the entity that originally brought the suit would probably have to be consultant and may have to give their consent. The experience of EPA in trying to promulgate the Ga. TMDLs within the impossible court deadline may be used as an example of why this may be desirable.]

C. EPA Proposal

1. States, Territories and authorized Tribes must submit a schedule to EPA of when TMDLs will be established for all waterbodies contained within Part 1 of the list of impaired and threatened waters. The schedule should *pace* the work so completion of all TMDL establishments will occur no later than 15 years from the original list submittal date. TMDLs must be established in accordance to the priority rankings (high priority waterbodies must have TMDLs established before those waters with a low ranking). The schedule for TMDL establishment must be submitted to EPA by October 1, 2000. EPA will not approve or disapprove of the schedule but will take the schedule into consideration when approving the list.

2. Public Review and Submittal Dates - Under the proposed guidelines, DMAs must produce a draft methodology, inform the public of its existence, take comments from the public for no less than 60 days, and provide a summary of these comments and the DMA's responses to the EPA along with the final methodology submittal. This process will allow the public and interested stakeholders to play an active role in the TMDL process.

3. The final methodology, along with the comments described above, must be submitted to the EPA by January 31, 2000. Once received, EPA will review the methodology and use it as part of the final list approval process.

D. EPA Questions

1. Would the new TMDL requirements affect the ability of States to perform their obligations as contemplated under **the various TMDL consent decrees and settlement agreements**? Pg. 46039, columns 3 paragraph 2.
2. On what extent will the new TMDL requirements render any of the **existing court-ordered TMDL** schedules unrealistic? Pg. 46039, columns 3 paragraph 2.
3. Is it appropriate for EPA to **approve TMDLs submitted for review within 12 months** of the final rule's effective date if those TMDLs meet either the pre-amendment requirements in § 130/7 or the post-amendment requirements being proposed, if not what would be the appropriate timeframe? Pg. 46039, columns 3 paragraph 2.
4. Should EPA establish a longer or shorter **transitional period of time**? Are there any alternative transition periods? Pg. 46039, columns 3 paragraph 2.
5. What potentially-applicable voluntary consensus standards apply to the proposed rulemaking, and why? Pg. 36045, columns 1 paragraph 6. **[general]**
6. Schedules for TMDL development needs to be developed by EPA/states. Schedule should not go past 15 years.[AH]
7. Should EPA **approve or disapprove** States, Territories and authorized Tribes **schedules** and should schedules be part of the lists of impaired and threatened waters? Pg. 46030, columns 1 paragraph 2.
8. Should EPA amend the **April 1 deadline in 40 CFR section 130.7(d)(1) to be October 1?** Should EPA promulgate this amendment in a separate action as soon as the comment period is over? EPA requests that if you comment on this amendment to highlight your comments. Pg. 46030, columns 2 paragraph 1.
9. Should States, Territories and authorized Tribes be required to develop **schedules** establishing TMDLs for all waterbodies on Part I of the list? Pg. 46028, columns 2 paragraph 2.

10. Should States, Territories and authorized Tribes be required to schedule **all high priority TMDLs before establishing TMDLs for medium and low-priority waterbodies?** Pg. 46028, columns 2 paragraph 2.

E. Possible WEF Comments

1. States should be given flexibility in establishing TMDLs. It may be easier and faster to establish TMDLs in some non-complex/lower priority watersheds that working immediately on the high priority watershed. The decision needs to be make based upon environmental risk and what can be done with limited resources. [AH]

VI. Resources

A. WEF Concepts

1. EPA has significantly underestimated the cost and the resources needed to derive scientifically valid TMDLs.

B. WEF Actions

1. We need to get as many estimates as possible for TMDL and TMDL like plans which are currently in place with respect to the cost to do TMDLs and the cost to implement the actions necessary to achieve the TMDL identified reductions.

The following Format will be used (**please let Libby know if you can get more**):

Water Body	TMDL Parameters	Date TMDL Forwarded to EPA	Cost to Derive TMDL (Source)	Comments
Long Island Sound (NY and Ct)	DO/Nitrogen Levels	NY and Ct still trying to develop	(Will try to get NY estimate from NYSDEC)	Libby will get
Onondaga Lake	Phophorus			Libby will get
NY/NJ Harbor	Metals			Libby will get

C. Possible WEF Comments

1. It appears that the proposed TMDL regulations is really an unfunded mandate. In order to perform the TMDL approach ,as proposed, enormous amount of state funding is necessary to monitor, assess appropriate TMDL targets, monitor progress, establish implementation schedules, etc. Additional funding should be provided by stakeholder who have the liability in restoring the waters back to the designated uses and additional funding need to be provided to states to drive these programs. The stakeholders responsible for the problems should pay to correct the problem.[AH] It is unclear who will pay for the non point source reductions ,as specified in the TMDL Implementation Plans. It is doubtful that Section 319 funding will be adequate to fund these projects. [AH] It is highly questionable that this proposed rule will not result in expenditures of greater the \$100 million for states. It will take an enormous amount of money to drive and maintain these TMDL program, which are very much needed to improve our nation's waters. There needs to be a clear mandate by the Congress and the President. [AH]

VII. Definitions:

A. Which ones do we want to comment on?

B. EPA Proposal

1. Revised Definitions

The most significantly revised definition is the one for TMDL. Presently, a **TMDL** is defined as:

“the sum of the individual wasteload allocations for point sources, load allocations for non-point sources and natural background”.

The proposed definition takes a very different view and includes the idea that TMDLs are established to **restore and maintain** water quality. The new definition is as follows.

“**TMDLs** are written plans and analyses established to ensure that the waterbody will attain and maintain water quality standards (as defined in 40 CFR 131) including consideration of reasonably foreseeable increases in pollutant loads....”

The definition then goes on to list the ten elements that must be a part of any TMDL submitted to the EPA.

The proposed definition of **wasteload allocation**,

“the portions of a TMDLs pollutant load allocated to a point source of pollutant”,

differs from the **existing definition** in that it no longer takes into account future point source loading. Likewise, the proposed definition for load allocation,

“The portion of a TMDLs pollutant load allocated to non-point sources of pollutant, including atmospheric deposition and natural background sources”,

no longer contains future load consideration but has an additional alteration. The proposed definition specifically mentions atmospheric deposition as a required non-point source consideration.

2. Proposed Additional Definitions

There are a total of five definitions, detailed below, that have been incorporated into the revised definition section of 40 CFR 130. EPA's reason for including these definitions is to clarify the regulation and support other proposed alterations.

Pollutant – Dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal and agricultural waste discharged into water.... (the definition proceeds to specify several exclusions)”

With the addition of a definition for pollutant, it now becomes possible to discern between pollution and pollutant, which becomes necessary during the listing process.

The next three definitions, waterbody, impaired waterbody and threatened water body, are included for the sole purpose of assisting DMAs with creating the list of impaired and threatened waterbodies.

Waterbody – A geographically defined portion of navigable waters, waters of the contiguous zone, and ocean waters under the jurisdiction of the United States, including segments of rivers, streams, lakes, wetlands, coastal waters, and ocean waters.”

Impaired Waterbody – Any waterbody of the United States that does not attain water quality standards (as defined in 40 CFR part 131) due to an individual pollutant, multiple pollutants, pollution, or an unknown cause of impairment. Where a waterbody receives

thermal discharge from one or more point sources, impaired means that the waterbody does not have or maintain a balanced indigenous population of shellfish, fish, and wildlife.”

“Threatened Waterbody – Any waterbody of the United States that currently attains water quality standards, but for which existing and readily available data and information on adverse declining trends indicate that water quality standards will likely be exceeded by the time of the next list of impaired and threatened waterbodies is required to be submitted to the EPA. Where a waterbody is threatened by a thermal discharge, threatened means that the waterbody has a balanced indigenous population of shellfish, fish, and wildlife, but adverse declining trends indicate that a balanced indigenous population of shellfish, fish, and wildlife will not be maintained by the time the next list of impaired and threatened waterbodies is required to be submitted to EPA.”

The last proposed additional definition is for reasonable assurance. Reasonable assurance encompasses the idea that the DMA can and will implement the determined wasteload and load reductions. An important aspect to note is the inclusion of the requirement that the DMA demonstrates the access to adequate funding for non-point source load reduction processes.

“Reasonable Assurance – Reasonable assurance means that you (the DMA) demonstrate that each wasteload allocation and load allocation in a TMDL will be implemented. For point sources regulated under section 402 of the Clean Water Act you must demonstrate reasonable assurance by procedures that ensure that enforceable NPDES permits (including coverage to individual sources under a general NPDES permit) will be issued expeditiously to implement applicable wasteload allocations for point sources. For non-point sources you must demonstrate reasonable assurance by specific procedures and mechanisms that ensure load allocations for non-point sources will be implemented for that waterbody. Specific procedures and mechanisms for non-point sources must apply to the pollutant for which the TMDL is being established, must be implemented expeditiously and must be supported by adequate funding. Examples of specific procedures and mechanisms which may provide reasonable assurance for non-point sources include State, Territorial, and authorized Tribal regulations, local ordinances, performance bonds, contracts, cost-share agreements, memorandums of understanding, site-specific or watershed-specific voluntary actions, and compliance audits of BMPs.”

3. Removal of 40 CFR 130.3

In the existing regulation, 40 CFR 130.3 defines and describes the term water quality standards. This exact same definition and description also appears in 40 CFR 131. EPA has proposed the removal of this section because it feels that it is redundant. This change is more of a housekeeping issue than an alteration in regulatory mandates.

C. EPA Proposals

1. Should EPA revise the existing ***definitions*** and/or add new definitions? Pg. 46017, columns 3 paragraph 2. *[general]*
2. Should EPA implement its proposed ***changes to the continuing planning process and water quality management regulatory requirements?*** Are there any additional changes needed to those requirements? Pg. 46040, columns 2 paragraph 1.